(1)

No. 06-711

FILED
DEC 2 [illegible]

In the Supreme Court of the United States

MICHAEL HANNING LORIZ,
CARA FRANCKE LORIZ,
Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents believe that this case really presents only one question which they state as follows: Whether the Court of Appeals correctly denied petitioners' request for an injunction pending appeal of the District Court's dismissal of all of petitioners' claims due to a lack of jurisdiction under the *Rooker-Feldman* doctrine, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (lack of ripeness), and other grounds, stemming from a decision by the Butler County Board of Zoning Appeals which granted a conditional use permit for commercial recreational use of an adjacent property.

PARTIES TO THE PROCEEDING UNDER RULE 14.1(b)

Respondents are the Honorable Judge Anthony Valen, The Honorable Judge William Young, The Honorable Judge Stephen W. Powell, John B. Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, Lee Steenken, Thomas Bevington, Gary Salmon, Alan Daniel, Walt Filpot, Thomas Turner, Roger Gates, William E. Balsinger, James M. Fox, John Zboril, Michael A. Fox, Gregory V. Jolivette, Charles E. Furmon, Anthony E. Dwyer, Richard K. Jones, Robin Piper and Steven A. Gray (Chief of the Ohio Department of Natural Resources Division of Wildlife).

Petitioners are Michael Hanning Loriz and Cara Francke Loriz.

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2) Order of the Sixth Circuit Court denying motion for injunction pending appeal, Case No. 06-3429, entered August 18, 2006;

3) Order of U.S. District Court, Southern District of Ohio adopting Report and Recommendations in Case No. 1:05-cv-00306-SSB-TSB, entered February 24, 2006;

4) Report and Recommendations of Magistrate Black, U.S. District Court, Southern District of Ohio, Case No. 1:05-cv-00306-SSB-TSB, entered December 29, 2005;

The above Opinions and Orders are those of the federal courts immediately below.[1]

The following are underlying Opinions and Order of state courts and agencies which have preceded the plaintiffs' complaint in federal court:[2]

1) Decision of the Butler County Common Pleas Court, Butler County, Ohio granting motion for summary judgment of the Butler County Officials, Loriz, et al vs.

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[1] These Opinions and Orders are all set forth in the *Petition Appendix*.

[2] These appear in as Appendices No. 9, 8, 7, 5 and 3, respectively.

Keller, et al, Case No. CV01-04-0714, entered December 6, 2005;

2) Opinion of the Twelfth District Court of Appeals, Butler County, Ohio, In Re: Application of Charles E. Keller, 2003-Ohio-6549, Appellate No. CA2003-04-100, dated December 8, 2003;

3) Final Appealable Order of the Butler County Common Pleas Court, Butler County, Ohio, Loriz, et al vs. Keller, et al, Case No. CV01-04-0714, entered April 11, 2003;

4) Order for Case Consolidation of the Butler County Common Pleas Court, Butler County, Ohio, Loriz, et al vs. Keller, et al, Case No. CV01-04-0714, entered December 11, 2001;

5) Decision of the Butler County Board of Zoning Appeals, In Re: Application of Keller, Case No. BZA01-26C, issued July 26, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by the petitioners, respondents rely upon 28 U.S.C. § 1257 and Ohio Revised Code Sections 2506.04, 163.05, 163.09, 163.17, 163.54, 163.55 and 163.61.[3]

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[3] These statutory provisions are provided in Appendix No.12.

STATEMENT OF THE CASE

The petition before the court arises from a long running, bitter and litigious dispute between two adjacent private landowners in Butler County, Ohio, the Lorizes who lived and the Kellers who run a business on their property with ~~Michael~~ Simons as Ridge Wind Quail Hunts, LLC. In 2001, Mr. Keller was cited for zoning ordinance violation in *In Re: BZA01-17V*, see Appendix No. 1, which case came on for hearing before the Butler County Board of Zoning Appeals on April 17, 2001. Prior to the Board of Zoning Appeal violation hearing, petitioners sued the Kellers, Ridge Wind, the National Shoot to Retrieve Association and the Chief of the Division of Wildlife, Department of Natural Resources of the State of Ohio in the Butler County Court of Common Pleas Case No. CV01-04-0714. See Complaint, Appendix No. 2, pp. 3a - 14a. The Board of Zoning Appeals upheld the violation notice.

In May of 2001, the Kellers applied for a conditional use permit for a commercial recreational use and a hearing was set for July 17, 2001. The petitioners were provided notice of the hearing as required by law and appeared with counsel at the hearing. The Lorizes presented testimony and evidence at the initial hearing. On July 26, 2001, the Board of Zoning Appeals issued its decision granting the conditional use permit with seventeen conditions. See Appendix No. 3, pp. 15a - 17a. This permit for a commercial recreational use permitted Ridge Wind to operate field trials for its patrons, sportsmen wishing to train and exhibit their hunting dogs' abilities.

Subsequent to the grant of the permit to the Kellers with conditions, the Lorizes appealed this decision to the Butler County Court of Common Pleas, Case No. CV01-08-1777, challenging the decision of the Board of Zoning Appeals. See

Appendix No. 4, pp. 18a - 19a. The Lorizes lost their challenge.[4] One of the original conditions on the permit was that the Kellers had to come back for annual review. During the review process, some of the other conditions were modified. Certain of these modifications are subject to an appeal by the Lorizes in Butler County Court of Common Pleas Case No. CV05-07-2228. See Appendix No. 10, pp. 51a - 52a.

Unhappy with their results in State Court, the Lorizes turned to Federal Court. Initially, they filed suit against the defendants in the Eastern District of New York, Case No. 04-CV-01331-(SJF)-(ARL). After that case was dismissed for improper venue, the Lorizes re-filed their action in the Southern District of Ohio, Western Division. The United States District Court for the Southern District of Ohio dismissed all of the petitioners' claims, including those for

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[4] On December 11, 2001, an Order to consolidate the Lorizes civil suit against the Kellers, Case No. CV01-04-0714, with the appeal of the Board of Zoning Appeals decision, Case No. CV01-08-1777, was issued consolidating the zoning appeal into the civil case. See Appendix No. 5, pp. 20a - 21a. On February 20, 2002, plaintiffs moved for leave to file an amended complaint which motion was granted. The amended complaint added the Butler County Board of Zoning Appeals members and the County Commission. See Appendix No. 6, pp.22a - 23a. The Final Appealable Order on the Zoning Appeal was entered on April 17, 2003 affirming the decision of the Board of Zoning Appeals. See Appendix No. 7, pp. 36a - 38a. Petitioners then appealed to the Twelfth District Court of Appeals. The Court of Appeals affirmed the decision. *See In Re: Application of Charles E. Keller*, 2003-Ohio-6549 (Dec. 8, 2003). Appendix No. 8, pp. 39a - 45a. However, it was not until December 6, 2005 that the Court of Common Pleas granted summary judgment to the county officials dismissing them from the consolidated lawsuit. See Appendix No. 9, pp. 46a - 50a.

injunctive relief. The Lorizes appealed and requested a preliminary injunction pending appeal. Specifically, with respect to the Butler County officials, the Lorizes requested the Court enjoin the permitting and licensing of the Kellers' shooting, dog training and field trial activities, and issue an injunction against the County conditional use permit.[5]

SUMMARY OF THE ARGUMENT

The District Court correctly did not rule on petitioners' request for an injunction. Likewise, the Sixth Circuit Court of Appeals correctly denied plaintiffs' request for an injunction. The lower courts' decisions were supported by several federal court doctrines which operate to bar petitioners' requests for relief. Most notably, this Court's *Rooker-Feldman* doctrine barred the lower courts from ruling on petitioners' claims for lack of subject matter jurisdiction. *Rooker-Feldman* arises from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) which stand for the proposition that state courts' decisions be given full force and effect and that only the United States Supreme Court has jurisdiction to review state court decisions.

Significantly, subject matter jurisdiction also is lacking even in this Court as well as the lower federal courts due to a lack of ripeness under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of*

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[5] See Motion for Preliminary Injunction Pending Appeal filed in the United States Court of Appeals for The Sixth Circuit, Case No. 06-3427, Page 2, attached as Appendix No. 11, p. 55a (only the portion of the Motion and Memorandum Requesting Relief were reproduced).

Johnson City, 473 U.S. 172 (1985). Petitioners' claims are not ripe under *Williamson County* since they fail to request compensation using state court procedures and fail to satisfy *Williamson County's* finality requirement that they exhaust the possibilities of obtaining relief from the Butler County Board of Zoning Appeals - the agency issuing the Order which they now seek to overturn by injunction.

In addition to these jurisdictional bars to petitioners' claims for relief, several doctrines warrant federal court abstention from interference with state court decisions. First, *Colorado River* abstention warrants federal courts to leave this matter in the hands of state court where it was first filed and is presently pending. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976). Not only was the Butler County Court of Common Pleas the first court to entertain plaintiffs' complaints, Butler County is the location of the majority of the witnesses, the evidence, the underlying county agency and is best suited to rule on petitioners' essentially state law nuisance claims. *Id.* Second, *Pullman* abstention likewise warrants showing comity toward the decisions and regulatory scheme set out by state government. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). Petitioners' state law nuisance claims which predominate the current case should be determined in state court which would obviate the need for any federal proceedings. Last but not least, *Burford* abstention limits federal court equitable jurisdiction which otherwise would interfere with the orders of state administrative agencies particularly where difficult questions of state law or the exercise of federal review would be disruptive to states' efforts to establish a coherent policy in matters of substantial public concern. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Even the substantive law implicated by petitioners' claims warrants a denial of their petition. This Court has long held that injunctive relief is not available from a taking claim where the aggrieved party can bring a suit for compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Ohio has compensation statutes for eminent domain proceedings. R.C. 163.01, et seq. Furthermore, the Sixth Circuit Court of Appeals has held that even where a suit for eminent domain was not instigated by the government, mandamus provides an appropriate procedure to an aggrieved landowner to obtain compensation in Ohio. *Coles v. Granville*, 448 F.3d 853, 862 (6th Cir. 2006).

Petitioners' claims do not fit within any of the categories this Court has established for per se rules to qualify for an injunction. Only facial challenges or instances where a petitioner's right to protect his property has been criminalized has this Court recognized the right to injunctive relief. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Duke Power Company v. Carolina Study Group, Inc.*, 438 U.S. 59 (1978). Cases in other areas of law such as criminal action related to seizure or due process violations do not constitute grounds for injunctive relief because petitioners' complaint sounds in the Fifth Amendment. Compare *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) to *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) and *Greene v. Lindsey*, 456 U.S. 444 (1982). Petitioners can cite to no specific examples, and respondents can find none where a zoning decision on an adjacent owner resulted in a taking upon a complainant. This is not a case of physical occupation, as argued by the petitioners, when this case is compared to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case is also not one involving the state holding petitioners' use a nuisance as in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). This case

is closer to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Instead of the regulation directly regulating petitioners' property, the regulation regulated the property of the Kellers, co-defendants in this litigation, which regulation had no more than an incidental effect on the property of the plaintiffs.

Petitioners have utterly failed to show that the property regulation of the Kellers' property was anything other than that contemplated by *Village of Euclid v. Ambler Realty Co.*, 72 U.S. 365 (1926). As this Court originally stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and more recently *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (unanimous decision), government has the right to affect property values through regulation without paying for it so long as it does not go too far. Petitioners are not entitled to injunctive relief. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (citations omitted).

As indicated above, one of the central issues fatal to petitioners' claim is that their federal claims are premature. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Additionally, petitioners failed to show that the issuance of injunction pending appeal would subject them to irreparable injury. Quite the contrary, injunction pending appeal would likely subject the Kellers to irreparable injury, potentially cause substantial harm to others and not be in the public interest. In addition, the petitioners do not have a strong likelihood of success on the merits regarding their federal claims. The merits of petitioners' state court nuisance claims, which are currently being litigated, should not weigh into whether petitioners have met all of the requirements to be in

federal court and or whether they will succeed with their claims against the Butler County officers in federal court.

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction Over the Petitioners' Claims

A. The Court Lacks Jurisdiction Under the *Rooker-Feldman* Doctrine

In the District Court, the Lorizes requested the Court to enjoin the permitting and licensing of the Keller property and an injunction against the County conditional use permit.[6] It is clear from the petitioners' Motion that they seek this Court to overturn the Ohio Common Pleas and Court of Appeals decisions affirming the Board of Zoning Appeals' grant of a permit to the Kellers. This request for relief is an improper invocation of Federal Jurisdiction under the *Rooker- Feldman* doctrine. The District Court properly dismissed this case stating

> "Under 28 U.S.C. §1257, final judgments of state courts are entitled to receive full faith and credit from this court, and the subordinate federal courts do not have jurisdiction to review these final judgments of state courts because the review of such determinations can only be obtained by the United States Supreme Court by writ of certiorari. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) (an appeal through the state courts to the U.S. Supreme Court is

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[6] The District Court did not rule upon the Motion for Preliminary Injunction Pending Appeal.

> the exclusive means by which a state court judgment may be reviewed for constitutional error); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-484 n. 6 (1983).[7]

While the Court of Appeals based its decision on the plaintiffs' failure to show irreparable harm, the District Court's ruling that *Rooker-Feldman* applies should be upheld, and the Lorizes' Petition should be denied.

Pursuant to the *Rooker-Feldman* doctrine, federal district courts lack subject matter jurisdiction "to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). The label of civil rights action cannot confer jurisdiction on a federal court to relitigate questions previously decided in state courts. *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209, 1211 (6th Cir. 1970). The Civil Rights Act was not designed to be used as a substitute for the right of appeal, nor as a vehicle to collaterally attack a state court judgment by re-litigating the issues already decided. *Id.*; *Tonti v. Petropoulos*, 656 F.2d 212 (6th Cir. 1981). A two-part test is used to determine whether *Rooker-Feldman* applies: 1) the federal claim is inextricably intertwined with the state court judgment, and 2) the federal claim must be a specific grievance that a law

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[7] See Report and Recommendation that the defendants' Motion to Dismiss (Docs. 14, 19) and For Judgment on the Pleadings (Doc. 25) be granted; that all claims against the non-moving defendants be *sua sponte* likewise dismissed; and that this case be closed (hereinafter Report & Recommendation) of Magistrate Black dated 12/29/05, Case No. 1:05CV306, (See Report and Recommendation, *Petition Appendix*, p. 14a).

was improperly or unconstitutionally applied, rather than a general challenge to the constitutionality of a state law. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 1523 (2005) (citations omitted). Because the facts alleged in the complaint satisfy both of these elements, the case was properly dismissed for lack of subject matter jurisdiction.

In affirming the Butler County Board of Zoning Appeals, the Ohio Twelfth District Court of Appeals specifically held that "the lower court did not abuse its discretion [in affirming the decision of the Board of Zoning Appeals] as there was evidence in the BZA findings to support its decision". *In Re: Application of Keller*, 2003-Ohio-6549, at ¶ 20 (Ohio App. 12 Dist. 2003). If this Court were to grant the Lorizes' any relief pursuant to their request for an injunction, it would necessarily require an evaluation of the Twelfth District's order in face of an acknowledgment by plaintiffs that the state court already declined them this relief. (Complaint, R. 1, ¶ 12, 59, attached to *Petition Appendix*, p. 29a). *Rooker-Feldman* prohibits such a result.

The Lorizes here have not challenged the constitutionality of Ohio laws governing zoning appeals. Rather, they requested the lower courts reverse, by injunction, the state court decision on the grounds that the state court reached an incorrect result. *Rooker-Feldman* is implicated only where plaintiffs bring a specific grievance regarding a particular decision, not where plaintiffs make a general challenge to the constitutionality of a state law as unconstitutional per se. *Exxon Mobil Corp.*, 125 S. Ct. at 1523; *Tropf v. Fidelity National Title Ins. Co.*, 289 F.3d 929, 937 (6th Cir. 2002). Accordingly, the District Court correctly dismissed the complaint and request for injunctive relief under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction.

B. The Court Lacks Jurisdiction Due to Lack of Ripeness Under *Williamson County Regional Planning Commission vs. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)

The District Court correctly held that "'[i]f a claim is unripe, Federal Courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.'" *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992) (other quotations and citations omitted).[8]

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-195 (1985) (*quoting Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 (note 21) (1984), this Court held that "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation' then a property owner 'has no claim against the government' for a taking." Ripeness not only has a component that an alleged taking victim seek compensation, but also that the victim obtain a final decision from the administrative agency before the question of whether a taking has occurred is judicially reviewable at the federal level. *Id.* at 192. While plaintiffs' petition is read as one for injunction pending appeal since the Sixth Circuit has not yet ruled on the merits as to the dismissal of all of plaintiffs' claims, a lack of jurisdiction for lack of ripeness is equally fatal to their request for injunction as to their claim for money damages. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1016.

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[8] See Report and Recommendation, *Petition Appendix*, p. 12a.

II. The Lower Courts Correctly Abstained From Reviewing the Matter

After the Lorizes filed this action in the District Court, the Butler County Court of Common Pleas dismissed the Butler County Board of Zoning Appeals, its members and the Butler County Commissioners from the ongoing and parallel State Court case in Butler County Common Pleas Case No. CV01-04-0714.[9] However, the Lorizes subsequently continued to litigate the conditional use permit in State appellate court. (See Notice of Appeal of Decision of the Zoning Board of Appeal of Butler County, Ohio, Butler County Common Pleas Case No. CV05-07-2228).[10] These cases remain open today. Several applicable abstention doctrines therefore limited the lower court's ability to proceed.

A. *Colorado River* Abstention Limits This Court's Review

The abstention doctrine established by *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976) established a balancing test for federal courts to evaluate whether to abstain from civil cases out of deference to parallel state proceedings. Five factors must guide any decision:

(1) *which court first assumed jurisdiction over the res or property involved* - in this matter, that would be

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[9]See Appendix No. 9, p. 46a.

[10]See Appendix No. 10 , p. 51a. On June 9, 2005, the Butler County Board of Zoning Appeals reviewed the conditions on the Keller property and removed some of the conditions. The Lorizes filed an appeal as to this decision, Case No. CV05-07-2228.

the Butler County Common Pleas Court (Complaint, R.1, ¶¶ 14, 27-32);

(2) *the inconvenience of the federal forum*;

(3) *the desirability of avoiding piecemeal litigation* - this case is duplicative and adds nothing to the ongoing state court litigation;

(4) *the order of filing for the state and federal actions* - this action was filed over four years after the Lorizes filed the March 2001 Complaint in state court (Complaint, R.1, ¶ 14); and

(5) *the presence of a federal question* - for all the reasons articulated in the other parts of this brief, the Lorizes failed to state a cognizable federal question as a matter of law.

Id. at 818-19 (quoted language in italics). This Court's abstention from deciding this matter would further the important policies of "conserving . . . judicial resources" and "avoiding duplicative litigation." *Id.* at 817.

B. *Pullman* Abstention Limits This Court's Review

This Court has likewise endorsed showing appropriate comity and a "scrupulous regard for the rightful independence of state governments." *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 500-501 (1941) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 457 (1919)). *Pullman* abstention is built upon the traditional avoidance of unnecessary constitutional decisions and the sovereign respect due to state courts. *Id.* It requires a federal court, faced with a constitutional challenge (or putative constitutional challenge)

to a state law (or, in this case, a state ruling), to defer the constitutional question and avoid a direct confrontation if a decision from the state court "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). Here, deferring to the ongoing state court obviates the need for this Court's intervention.

C. *Burford* Abstention Limits This Court's Review

Finally, the *Burford* abstention doctrine - which arises from this Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) - is likewise applicable. In *Burford*, the Court held that a federal court should abstain from granting relief that will disrupt a complex state regulatory scheme. In a more recent formulation of the doctrine, this Court held:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989). In this case, the Lorizes seek to overturn permits issued by the Ohio Department of Natural Resources and County zoning decisions all of which have been approved by Ohio state courts and are *still* being

litigated in the Butler County Court of Common Pleas. Ohio has created a coherent policy with respect to a matter of substantial public concern, and this Court should not make decisions implicating it. Federal courts have repeatedly held that federal challenges to land-use permits such as the one at bar are subject to *Burford* abstention. *See, e.g., Ellis v. Gallatin Steel Co.*, 390 F. 3d 461, 479-81 (6th Cir. 2004); *McDonald v. Village of Newport*, 164 F.3d 963 (6th Cir. 1999); *Ada-Cacade Watch Co., Inc. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 903 (6th Cir. 1983).

In the instant case, the Lorizes want this Court to review the decisions of state and local bodies granting permits and licenses to the Ridge Wind defendants regarding the use of their land. Such a controversy is entirely a local matter, and the federal courts should abstain from exercising jurisdiction over it. Ohio R.C. § 2506.04 provides the legal basis upon which a Court of Common Pleas can reverse an administrative officer or agency. The Lorizes have already availed themselves of administrative appeals on at least two occasions with regard to the current controversy; Butler County Common Court of Common Pleas Case No. CV01-04-0714 (in which the Butler County Commissioners and the Butler County Board of Zoning Appeals and its members were dismissed in December of 2005) and more recently in Butler County Court of Common Pleas Case No. CV05-07-2228 (still pending). A federal court's review would therefore be improper. For all these reasons, this Court should uphold the lower court's denial of plaintiffs' motion for an injunction pending appeal.

III. Petitioners Are Not Entitled to an Injunction When a Suit For Compensation Can Be Brought

As stated in *Ruckelshaus v. Monsanto Co.*, this Court held

> "equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."

467 U.S. at 1016 (citations omitted). Petitioners do not claim that the Butler County Board of Zoning Appeals is not a duly authorized body under Ohio state law, nor have they alleged that the Butler County Zoning ordinances were defective or otherwise not in full force and effect. Thus, the actions of the Butler County Board of Zoning Appeals were, as this Court stated in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (unanimous opinion), typical

> "'government regulation [which] by definition [,] involves the adjustment of rights for the public good' *Andrus v. Allard*, 444 U.S. 51, 65, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1997) [noting] that 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' [*Pennsylvania Coal Co. v.] Mahon*, [260 U.S. 393,] 413 [(1922)]."

A. Ohio Has Provisions For Awarding Compensation For Persons Whose Property Has Been Condemned

The Lorizes have statutory remedies under Chapter 163 of the Ohio Revised Code.[11] The Ohio system even provides for the payment of interest to the property owner to ensure full compensation. R.C. 163.17.[12] The Ohio system goes so far as to make payments to persons displaced from their dwelling so they can acquire a comparable replacement dwelling. R.C. 163.54[13] and .55.[14] Also, incidental expenses may be paid to the land owner. R.C. 163.61[15]. Therefore, Ohio condemnation statutes do provide compensation, contrary to the Lorizes' contention.

B. In Ohio, Mandamus Is the Appropriate Procedure to Seek Compensation When a Case of Condemnation Has Not Been Brought

The Sixth Circuit Court of Appeals noted in *Coles v. Granville*, 448 F.3d 853, 862 (6th Cir. 2006) (quoting *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700 (1996):

> "'In regulatory cases, where the government has fulfilled its obligation to provide notice to the property

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[11] See Appendix No. 12, pp.57a - 60a for statutes R.C. 163.05 and 163.09.

[12] See Appendix No. 12, p. 61a - 62a

[13] See Appendix No. 12, p. 63a.

[14] See Appendix No. 12, p. 64a.

[15] See Appendix No. 12, p. 65a.

> owner, it may be fair to place the burden of making the next move on the landowner. It may make sense to require landowners to pursue relief through administrative appeals and the mandatory injunction process when the landowners know in advance that the government is planning action that threatens their property . . .since there are generally numerous opportunities available to landowners to be heard and to attempt to prevent a proposed zoning ordinance from taking effect, or to reach a compromise with the authorities that permit some alternative use of the land.'"

While in *Kruse* the court also held that mandamus does not afford an appropriate remedy for one whose land was taken by physical invasion,74 F.3d at 700, *Coles* held that this was a decision only made necessary due to the temporal flux of Ohio state law which had since resolved through a minimum of six Ohio Supreme Court decisions affirming the use of mandamus and the general acceptance of mandamus by Ohio intermediate courts. *Coles*, 448 F.3d at 863 (citations omitted).

Thus, Ohio's remedy of mandamus is now firmly established and Ohio provides for a statutory scheme to compensate property owners whose land has allegedly been taken, facts which weigh heavily against the prospect of injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (citations omitted).

IV. The State Agency Decision Which Petitioners Find Objectionable Merely Affected Their Property Interests Through A Proper Exercise of State Police Power Adjusting of the Benefits and Burdens of Property Ownership and Does Not Qualify For Application of a Per Se Taking Rule or Injunction

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (emphasis added, italics in original), this Court held that

> "the *functional* basis for permitting the government, by regulation, to affect property values without compensation-that 'government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,] 413 [(1922)] - does not apply to the relative rare situations where the government has deprived a landowner of <u>all</u> economically beneficial uses."

See also Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. at 199. The petitioners have failed to establish that they have been deprived of all beneficial uses. They merely argue that their two chosen uses have been interfered with as a result of the business of Ridge Wind.

This Court, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540 (2005), discussed the practical limitations of per se rules such as found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (depriving an owner of all economically beneficial use) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (granting rights

over the property of another resulting in a physical invasion, no matter how minor) and the balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (requiring the evaluation of the economic impact of the regulation, its interference with distinct investment backed expectations, the character of the governmental action and whether the regulation was merely an adjusting of the benefits and burdens of economic life).[16] As noted throughout this response to the Petition, there are many reasons why an injunction does not lie.[17] Most notably among these is that the petitioners do not fall within the narrowly prescribed per se rules requiring compensation or an injunction.

A. Petitioners' Claim Is An As Applied Challenge, Not a Facial Challenge, For Which An Injunction Is Not Available

As noted in Section I(A), petitioners are making an as applied challenge. However, the jurisprudence is clear that injunctions are generally only available for pre-enforcement facial challenges. *Hynes v. Grimes Packing Co.*, 337 U.S. 86

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[16] Similar situations as between petitioners and the Ridge Wind defendants could have arisen with other commercial uses. Had Ridge Wind been a golf course or driving range, petitioners could have suffered overshot golf balls. Had Ridge Wind been a motocross course, petitioners could have suffered noise, dust, sediment laden run off and increased air pollution. Had Ridge Wind been a landfill, petitioners could have suffered increased noise, odor and scavengers.

[17] See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (citations omitted).

(1949); *Daniels v. Area Planning Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002). Other cases cited by petitioners for the proposition that an injunction is available are not applicable. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (drug forfeiture laws require due process pre-seizure); *Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (requiring actual service for notice of eviction proceedings). In *Duke Power Company v. Carolina Study Group, Inc.*, 438 U.S. 59, 71 fn. 15, (1978), this Court indicated where an individual is subject to a taking, he can seek a declaration as to the constitutionality of the legislation under the Declaratory Judgment Act. However, petitioners are not seeking advanced assurance of adequate compensation or a declaration of unconstitutionality regarding threatened action. They are seeking to have this Court reverse the decisions of the Butler County Board of Zoning Appeals, Butler County Court of Common Pleas and the Ohio Twelfth District Court of Appeals allowing a commercial recreational use permit. As this is not a facial challenge but an as applied challenge, injunctive relief is not available and as noted above, *Rooker-Feldman* applies.

B. Petitioners' Rights to Protect Their Property Have Not Been Criminalized

Petitioners discuss several cases as standing for the proposition that an alleged taking victim is entitled to an injunction. While some of these cases can be distinguished on the basis that they were facial challenges to the constitutionality of laws, some were as applied challenges. However, petitioners' cited cases of takings of rights appurtenant to real property, whether as applied challenges or facial challenges, which granted injunctions can be distinguished on the fact that the alleged taking victim's

ability to protect or enjoy its property rights had been criminalized.

In *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 97 (1949), the Regional Director, Fish & Wildlife Service, Dept. of the Interior Frank Hynes was charged with the duty of enforcing Acts of Congress and regulations issued thereunder as related to waters in the proximity of Kodiak Island in Alaska. Under one regulation, Hynes "threatened the seizure of all boats and equipment used to fish in the waters covered by this regulation to respondents' substantial and irreparable loss." *Id.* Both the District Court and the Ninth Circuit Court of Appeals had held the regulation invalid and enjoined its enforcement. *Id.* at 96. Violation of the applicable regulation could result in fines, imprisonment, seizure of boats, gear, equipment, and the catch with forfeiture to the United States. *Id.* at 99. The Court held

> "the sanctions deny to respondents an adequate remedy at law for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee in compliance with the fishing rules of the natives. Yet, to stay out of the reservation prevents the profitable operation of the canaries."[18]

Id. at 99. In light of the criminalization of the ability to profitably carry on their businesses as they had in the past and given the statute's invalidity, injunctive relief was necessary for the protection of property rights in the context of the facial

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[18] The regulation gave exclusive right to the native Indians to issue permits for fishing inside a restricted area set by the Indians which area was protected by the regulation. *Id.* at 98.

challenge. *Id.* at 98-99. Thus, *Hynes* is readily distinguishable from the facts of the case at bar as the plaintiffs are making an as applied challenge and have not alleged a criminalization of their ability to protect their property.

Petitioners, assuming it is determined that they have suffered a private taking, cite *Montgomery v. Carter County*, 226 F.3d 758 (6th Cir. 2000), for the proposition that they are entitled to have the taking desist (i.e., an injunction) as well as to more than "just compensation." *Petition* at p. 19 (citing *Montgomery v. Carter County*, 266 F. 3d at766).[19] However, the *Montgomery* court does not explore the issue of equitable relief stating merely

> "private-use takings, rare as they may be, are unconstitutional regardless of whether just compensation is paid. *See, e.g., [Hawaii Housing Authority v.] Midkiff*, 467 U.S. [229,] 245, 104 S. Ct. 2321 [(1984)] ('a purely private taking could not withstand the scrutiny of the public use requirements; it would serve no legitimate purpose of government and would thus be void.'); *Porter v. DiBlasio*, 93 F.3d 301, 310 (7th Cir. 1996) ('the Constitution forbids a taking executed for no other reason than to confer a private benefit on a particular private party, even when the taking is compensated.'). Moreover, eminent domain proceedings do not supply the appropriate remedy. Unwilling landowners must accept being forcibly bought out by the state if the

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[19] *Montgomery v. Carter County*, was incorrectly cited by petitioners at p. 4 as "266 F.3d 758, 766." The correct cite is 226 F.3d 758.

> purchase is for a public use and if just compensation (which is 'fair market value,' *Gamble [v. Eau Claire County]*, 5 F.3d [285,] 287 [(7th Cir. 1993)] is paid. A person whose property is confiscated for a strictly private use need not settle for 'just compensation.'"

Montgomery, 226 F.3d at 766-767.

Even if *Montgomery* could be construed as permitting injunctive relief to enjoin a private-use taking, it is distinguishable on multiple grounds from the claims of the petitioners. The facts in *Montgomery* were that Mary L. Nave had owned property which included an eleven foot wide driveway more than five hundred feet long. *Id.* at 761. At some point in time, the driveway became listed as a county road. *Id.* at 762. After victimized by two attempted robberies, one successful, she wanted to erect a fence and gate on the driveway. *Id.* At about this same time, her daughter, in trying to take care an underground water pipe, was informed that the driveway was a public road. *Id.* at 763. Eventually, the county took the position that the driveway was a public road. *Id.* The court noted Tennessee law prohibited the obstruction of public roads and that fencing or gating of the driveway would have been an illegal act. *Id.* at 762. Thus, the declaration that the driveway was a county road allowed any member of the public to occupy the road and gave Nave no right to exclude them. Additionally, attempts to exclude members of the public were criminalized by Tennessee statute. In contrast, petitioners' right to exclude members of the public from their property is intact. Likewise, their ability to fence off their property has not been criminalized. Thus, the facts of *Montgomery v. Carter County* are not analogous to the facts of the petitioners' case.

V. Petitioners Are Not Otherwise Entitled to Injunctive Relief for Any of the Alleged Constitutional Violations They Raise

The petitioners allege that their substantive due process rights have been violated by state action qualifying petitioners for injunctive relief due to irreparable harm. *Petition* at p. 28 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). However, the examples that *Lingle* cites were failing "to meet the 'public use' requirement or [to be] so arbitrary as to violate due process . . ." *Id.* at 543. *Lingle* clarified that a taking analysis and a due process analysis are two separate issues. *Id.* at 540. In *Lingle*, this Court noted that the due process test to challenge a zoning ordinance announced in *Village of Euclid v. Ambler Realty Co.*, 72 U.S. 365, 395 (1926), which held "that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly or arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*,'" was still proper due process analysis for constitutionality. *Lingle*, 544 U.S. at 541 (emphasis in original). As noted previously, many conditions were imposed upon the Kellers for the public health, safety and general welfare based upon the testimony presented to the Board of Zoning Appeals. While there could have been more restrictive conditions, petitioners cannot establish that the decision was clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals and general welfare. Thus, petitioners cannot establish a substantive due process violation by the Board of Zoning Appeals and are not entitled to an injunction as the BZA's decision was clearly neither arbitrary nor unreasonable.

A. Petitioners' Due Process Claims Are Premature Prior To a Final State Agency Decision

This Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, clearly held that a due process claim cannot be ruled upon until the person affected obtains a final decision. 473 U.S. at 199-200; *See also Covington Court Limited v. Village of Oakbrook*, 77 F.3d 177, 179 (7th Cir. 1996) (citing *Williamson County*, 473 U.S. at 188-189). As discussed in I(B) above, petitioners have failed to satisfy the finality requirement. Therefore, the petition should be dismissed.

B. Petitioners Fail to Show Entitlement to an Injunction Pending Appeal

Even if there had been a final decision, a substantive due process violation through a land-use regulation entitles the victim only to "authorized and appropriate actual damages." *Id.* at 197 (citations omitted). In addition to the fact that the petitioners have not suffered irreparable harm from the permit issued to the Kellers, petitioners' alleged first amendment claim does not entitle them to an injunction since the alleged violation was neither threatened nor occurring at the time of the relief being sought. *See Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). The general test of assessing whether someone is entitled to a preliminary injunction was set forth in *Southwest Williamson County Community Association v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001) (interior quotations omitted):

> "a district court must consider: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a

> preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a preliminary injunction."

As already noted, actual damages are the appropriate measure for relief. However, due to the lack of finality with the petitioners failing to request variances or other relief to protect their property, the effect of the potential application of zoning by the Board of Zoning Appeals on petitioners' property cannot be measured. *See Williamson County Regional Planning Commission,* 473 U.S. at 200.

While the Sixth Circuit indicated petitioners may have a chance of success on the merits, it did not offer an opinion as to which, if any, of the myriad of claims the petitioners have brought would likely have success. *Petition Appendix,* p. 2a. Likewise, there was a lack of discussion as to harm to others and the public interest. *Petition Appendix*, pp. 2a-3a. The potential of an inunction causing harm to others such as the Kellers is obvious. Suffering an injunction would cause a complete loss of their business revenue related to their commercial recreational use permit and may also expose them to additional liabilities as a result of not being able to fulfill obligations to patrons. Residents of Butler County also may be harmed if an injunction were to issue as they would likely be forced to travel farther to find a comparable facility for field trials and other sporting events. Lastly, the public interest would not be served by an injunction against a permit appropriately issued after hearings and proper notice to affected landowners and multiple state court appeals.

Kallstrom v. City of Columbus, 163 F.3d 1055, (6th Cir. 1998) is also distinguishable from the facts of petitioners' claims. In *Kallstrom*, the City of Columbus threatened of release confidential personal information of undercover police

officers to the criminal gang subjects of their investigation implicating their fundamental privacy rights under the due process clause. *Id.* at 1060-1061. However, the type of governmental action in *Kallstrom* is not the same as faced by the petitioners. In the instant case, the petitioners have been subject to acts of private individuals, perhaps careless, shooting into their property during field trial events. As discussed above, the petitioners did not seek finality with respect to the impact of the grant of the commercial recreational use permit to the Kellers. Therefore, comparing the undercover officers' complete lack of control over their identity and personal information once it is disclosed is not the same as the situation faced by the Lorizes when they have failed to explore all of the potential relief that could be afforded to them through the county board of zoning appeals. Likewise, in *Kallstrom*, the potential recipients of the confidential, personal information had reasons to despise, hate and seek retribution against the officers for their investigation. Unlike in *Kallstrom*, the patrons of the Kellers who have come to the property to conduct field trials have not been criminally investigated or prosecuted by the Lorizes.[20] Although, patrons could potentially be sued civilly should they cause any damage to the Loriz property or subject to prosecution for any criminal violations. However, these consequences would be no different for anyone who damages someone else's property while in the course of hunting or sporting activities.

CONCLUSION

This Court should deny plaintiffs' petition for writ of certiorari. Petitioners have continually failed to take the

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[20] See Complaint, ¶ 45, *Petition Appendix*, p. 40a.

appropriate steps which are prerequisites to properly requesting federal relief. This Court should abstain from interfering with the state agency and court proceedings which are currently ongoing. This Court should refuse injunctive relief since the alleged taking claim is not ripe for federal action. It is doubtful that plaintiffs could succeed on the merits even if they had met the jurisdictional requirements of a taking claim when this Court considers that the outcome of the nuisance action in state court will likely be determative of the litigation between the Kellers and the Lorizes. Butler County requests that this Court deny petitioners' request for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Violation Number 1
Date February 28, 2001

NOTICE OF VIOLATION
UNDER BUTLER COUNTY ZONING RESOLUTION
BUILDING AND ZONING DEPARTMENT
130 HIGH STREET
HAMILTON, OHIO 45011

Charles & Christopher Keller
1242 Bauer Rd.
Somerville, Ohio 45064

Dear Mr. Keller:

You are hereby notified that your property in Milford Twp. Somerville Ohio, 45064 parcel #'s F2610-012-000-028, F2610-012-000-036 & F2610-012-000-037 is used in violation of Butler County Zoning Resolution, Section(s) 6.01, 6.08, 7.01 & 7.03 in the following manner: Running of a commercial recreation facility from your property in a open yard A-1 Agricultural Zoning District.

You are hereby requested to discontinue, cease and desist this violation within ten (10) days from the date of the NOTICE OF VIOLATION in compliance with the requirement of the Zoning Resolution, Section 25.1 by: permanently ceasing the use and removing all business activities from the property unless and until you secure necessary Zoning authorization to conduct a commercial recreation activity on this property.

Failure to comply will result in legal action begin taken!

If you have further question regarding this matter, or if you wish to file an appeal from this order with the County Board of Zoning Appeals, please contact my office @ (513) 887-3204.

Respectfully,

/s/_____

James M. Fox
Zoning & Drainage Inspector

APPENDIX 2

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO.: CV2001-04-0714

[Filed April 9, 2001]

MICHAEL & CARA LORIZ)
1566 OXFORD-MIDDLETOWN ROAD)
HAMILTON, OHIO 45013)
Plaintiffs,)
)
v.)
)
CHARLES E. KELLER)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
CHRISTOPHER E. KELLER)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
RIDGEWIND QUAIL FARMS)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)

AND)
)
NATIONAL SHOOT TO RETRIEVE)
ASSOCIATION-OHIO REGION C/O)
REGION PRESIDENT: DION BLISS)
642 SANDUSKY STREET)
ASHLAND, OHIO 44805)
)
AND)
)
MICHAEL J. BUDZIK CHIEF,)
DIVISION OF WILDLIFE, OHIO)
DEPARTMENT OF NATURAL)
RESOURCES)
1840 BELCHER DRIVE)
BUILDING G-3)
COLUMBUS, OHIO 43224)
Defendants.)
)

COMPLAINT OTHER CIVIL
WITH JURY DEMAND

Now come the Plaintiffs, Michael and Cara Loriz, through their Complaint, and causes of action, state as follows:

I. PARTIES

1. Plaintiffs, Michael and Cara Loriz (hereinafter referred to as "Loriz"), are husband and wife, and are the owners of residential property located at 1566 Oxford-Middletown Road, Milford Township, Butler County, Ohio.

2. Defendants Charles E. Keller and Christopher E. Keller are the owners of land located at 6508 State Road, Milford

Township, Butler County, Ohio, and more specifically defined in the Butler County Auditor's Property records as comprised of parcel numbers F2610-012-000-028, F2610-012-000-036, and F2610-012-000-037 (hereinafter referred to as the "Keller Farm").

3. The Defendants Charles E. Keller and Christopher E. Keller (hereinafter referred to as "Kellers"), are residents of Butler County, Ohio, residing at 1242 Bauer Road, Somerville, Butler County, Ohio.

4. The Defendant Ridgewind Quail Farms, is an unincorporated Field Trial Club, as that term is used in Title XV Conservation of Natural Resources, Ohio Revised Code 1533 et seq., owned and operated by Defendant Charles E. Keller. Ridgewind Quail Farms principle place of business is 1242 Bauer Road, Somerville, Butler County, Ohio.

5. The Defendant National Shoot to Retrieve Association - Ohio Region, is an unincorporated association, operated by Regional President David Bliss whose principle place of business is 642 Sandusky St. Ashland, OH 44805.

6. Michael J. Budzik is the Chief of the Wildlife Division, for the Ohio Department of Natural Resources, an agency within the State of Ohio, whose jurisdiction spans the State.

7. Venue properly lies in the Court of Common Pleas, Butler County, State of Ohio pursuant to Civ.R. 3. Jurisdiction properly lies with the Court of Common Pleas, Butler County, State of Ohio.

II. OPERTATIVE FACTS

8. The Loriz property is comprised of approximately 47

acres, a portion of which shares a common property line with the Keller Farm. The Keller Farm is comprised of approximately 180 acres. Both properties are zoned A-1 (Agricultural District) as defined in the Butler County Zoning Resolutions as revised 11 March 2000.

9. The Loriz property is mostly wooded, and is being reforested under the State of Ohio's State Stewardship Incentive plan.

10. The Keller Farm is primarily cultivated fields.

11. The Loriz family residence is located less than 200 feet from the property line with the Keller Farm.

12. On or about November 2000, the Defendants began to advertise hunting, under the name Ridgewind Quail Farm. Advertising was accomplished by the posting of signs in the area surrounding Defendants' property located at 6508 State Road, with the name Ridgewind Quail Farm, combined with a phone number with the number's suffix as "HUNT."

13. On or about 10 May 2000, Charles E. Keller applied and received approval for a Dog Training Grounds Application and Permit, with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.191. (Copy of Permit application attached as Plaintiffs' Exhibit "A" and hereinafter referred to as "Training Permit".)

14. The Training Permit failed to provide a proper legal description of the property where the training was to be conducted.

15. On or about 10 May 2000, Charles E. Keller applied for a Commercial Wild Animal Propagation Permit

Application and License, with the Ohio Department of Natural-Resources, pursuant to Ohio Revised Code 1533.71. (Copy of permit application attached as Plaintiffs' Exhibit "B" and hereinafter referred to as "Propagation Permit".)

16. The Propagation Permit specified the Bobwhite Quail were to be held at the Keller Farm.

17. At a date, as yet unknown, but within the preceding 10 months, Charles E. Keller applied for a Field Trial Club permit with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.19.

18. On or about 20 and 21 January 2001, the Loriz family was awakened to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of 20 January 2001 and was repeated on 21 January 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles and Christopher Keller, in their individual capacities, and through a field trial club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant National Shoot to Retrieve Association - Ohio Region. This trial was approved by the Defendant, Division of Wildlife, Ohio Department of Natural Resources. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

19. On or about 24 and 25 March 2001, a second field trial was conducted upon the Keller Farm again, awakening the Loriz family to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles

running. This continued during the course of the entire day of 24 March 2001 and was repeated on 25 March 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles and Christopher Keller, in their individual capacities, and through a field trial club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant National Shoot to Retrieve Association - Ohio Region. This trial was approved by the Defendant, Division of Wildlife, Ohio Department of Natural Resources. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

20. Other field trials, and activities envisioned by the Field Trial permits, have occurred on the Keller Farm in the preceding six months.

21. The Kellers constructed, or caused to be constructed, two wooden towers, in excess of fifteen feet in height, upon the Keller Farm and are utilized judging the Field Trials which were the subject of the aforementioned permits. Such towers are within several hundred feet of the Loriz family residence.

22. The 20 and 21 January 2001 activities that occurred on the Keller Farm, were field trials, as that term is defined in the O.R.C. 1533 *et. seq.* The Kellers, nor Ridgewind Quail Farms, nor the National Shoot to Retrieve Association - Ohio Region were in compliance with the signage requirements of O.R.C. 1533.22.

23. The 20 and 21 January 2001 activities that occurred on the Keller Farm, and the activities occurring on

24 and 25 March 2001, as well as the recently constructed two towers are all in violation of Articles 6 and 7 of the Butler County Zoning Resolutions as revised 11 March 2000.

24. On 28 February 2001, the Butler County Building and Zoning Department issued a "Notice of Violation Under Butler County Zoning Resolution." (copy attached as Plaintiffs' Exhibit "C"). The aforementioned Notice of Violation specifically identified violations of Sections 6.01, 6.08, 7.01 and 7.03 of the Butler County Zoning Resolutions as revised 11 March 2000.

25. Participants of the 20 and 21 January 2001 activities originating upon the Keller Farm, trespassed upon the Loriz property.

26. The activities that occurred on 20-21 January 2001 and 24-25 March 2001, upon the Keller Farm, as well as at other times within the past six months have caused the Loriz family to fear walking outside on their own property in an area that is in close proximity to the aforementioned activities for fear of being stricken by shotgun pellets emanating from the activities occurring upon the Keller Farm.

27. The Defendant, Michael J. Budzik Chief of the Division of Wildlife, Ohio Department of Natural Resources (hereinafter referred to as "ODNR"), granted, directly or through one of his agents, permits to Charles E. Keller (attached as Plaintiffs' Exhibits A & B) granting permission from the State of Ohio. The granting of such permits, without any consideration of the property rights of adjoining property owners, constitutes a State sanctioned taking of private property without due process and is therefore unconstitutional, as it is in violation of the Ohio Constitution and the U.S. Constitution.

COUNT ONE
VIOLATION OF THE BUTLER COUNTY ZONING RESOLUTIONS

28. Plaintiffs repeat Paragraphs one (1) through twenty-seven (27) as if fully rewritten herein.

29. The Defendants, the Kellers and Ridgewind Quail Farm, are in violation of the Butler County Zoning Resolutions, and such violations result in the Loriz loss of Quiet Enjoyment, such violations constitute a wrongful taking of real property, as the Loriz may not use that portion of their property adjoining the Keller Farm, when field trial activities are taking place. The Kellers use the Loriz wooded property to provide "cover" for Quail they raise and release for field trials unjustly enriches them at the Loriz expense.

30. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT TWO
LOSS OF QUIET ENJOYMENT

31. Plaintiffs repeat Paragraphs one (1) through thirty (30) as if fully rewritten herein.

32. The Field Trial activities identified above, are permitted by the Defendants, the Kellers and Ridgewind Quail Farm, and result in the Loriz loss of Quiet Enjoyment. The activities preclude the Loriz from enjoying their property in a manner to be expected for property zoned A-1 Agricultural as set forth above.

33. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT THREE
TRESSPASS TO LAND

34. Plaintiffs repeat Paragraphs one (1) through thirty-three (33) as if fully rewritten herein.

35. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, resulted in the Loriz property being trespassed upon.

36. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FOUR
NUISANCE

37. Plaintiffs repeat Paragraphs one (1) through thirty-six (36) as if fully rewritten herein.

38. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, actions constitute a Nuisance, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio

Revised Code. 1533.22, and their failure to wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the Field Trials are firing their weapons in close proximity to the Loriz family home, thereby creating a potential and unreasonable risk of harm.

39. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FIVE
PRIVATE TAKING OF REAL PROPERTY

40. Plaintiffs repeat Paragraphs one (1) through thirty-nine (39) as if fully rewritten herein.

41. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, actions constitute a Private Taking of Real Property, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the Field Trials are firing their weapons in close proximity to the Loriz family home and adjacent property, creating a potential and unreasonable risk that someone on the Loriz property may be struck by shot from participants in the Field Trail. Such risk, thereby precludes a reasonable and prudent person from utilizing their personal property for their own use and enjoyment during the aforementioned field trials.

42. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT SIX
VIOLATION OF DUE PROCESS RIGHTS

43. Plaintiffs repeat Paragraphs one (1) through forty-two (42) as if fully rewritten herein.

44. The Defendant's, ODNR, granting of the Training Permit, the Propagation Permit, and Field Trial Club permit constitute a taking of the Loriz property without just review or compensation and deprive Loriz of his due process rights, such that ODNR's granting of the permits is unconstitutional under the Ohio and U.S. Constitutions.

45. Ohio Revised .Code 1533.19 Field Trial Club Permits is unconstitutional, as it results in State sanctioned activities which have resulted in the private taking of property, and done so with out any regard for adjoining owner's due process rights. The state failed to provide notice and an opportunity to be heard at a meaningful time and in a meaningful manner where the state seeks to infringe a property interest. Such actions are in violation of the Ohio Constitution, to include Section 19, Article I, well as the United States Constitution via the Fourteenth Amendment.

46. As a direct and proximate result of the Defends actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

WHEREFORE, Plaintiffs pray that this Court grant judgment in an amount in excess of Twenty-Five Thousand Dollars ($25,000.00), representing the damages suffered by

Plaintiffs as a result of Defendants violation of the Zoning Resolutions, loss of quiet enjoyment, trespass to land, nuisance, private taking of real property, and violation of Plaintiffs' Due Process Rights, plus court costs, punitive damages, attorney's fees, and all other relief that this Court deems fit.

Respectfully Submitted,

BRANDABUR & BOWLING
A Legal Professional Association
/s/_____
Michael J. Brandabur (OH #0067246)
Plaintiffs' Trial Attorney
306 South Third Street
Hamilton, Ohio 45011
Phone Number: 513.892.3400

JURY DEMAND

The Plaintiffs herein requests this court empanel a jury to hear the within cause of action.

/s/_____
Michael J. Brandabur (OH #0067246)
Plaintiffs' Trial Attorney

APPENDIX 3

BUTLER COUNTY, OHIO
BOARD OF COMMISSIONERS

Commissioners
Charles R. Furmon
Courtney E. Combs
Michael A. Fox

Resolution Concerning a Variance from the Zoning Resolution of Butler County Resolution No. 01-26C

WHEREAS, Application of Charles E. Keller Case Number BZA01-26C submitted to the Board of Zoning Appeals, to grant a Conditional Use from/under Section(s) 6.01, 6.08, 7.01, 7.03, 7.0301, 26.5, 26.51, 26.52 & 26.52203 of the Butler County Zoning Resolution for permission to: conduct a commercial bird shooting preserve from his property.

Location of said property: 6508 State Road
Somerville, Ohio 45064

WHEREAS, Said application was reviewed by the Board at a regular meeting held in conjunction therewith on July 17, 2001.

WHEREAS, an appropriate study of said application was made by the Board; and

NOW THEREFORE BE IT RESOLVED, that on the basis of the above and by virtue of the authority vested in the Board

of Zoning Appeals by law, said Board herewith approved this request with the following stipulations:

1. There will be at least 10 hard surface parking spaces.
2. The drive must be concrete or blacktop on the common driveway from State Road to where it enters Mr. Keller's property, to eliminate dust.
3. There must be a landscape buffer on both sides of the rear boundaries.
4. There will be no direct lighting or glare on any other property owner.
5. There cannot be a sign any larger than 1 sq. ft. stating the area.
6. This will be a Conditional Use only for Mr. Keller. Any new owner must come before the Board.
7. There will be a safety zone established and clearly marked on all boundaries.
8. There will be a 100-foot buffer along any adjoining property line that requests it.
9. The area used for the commercial hunting must be entirely fenced and signed to the Ohio Department of Natural Resource's specifications.
10. There will be an annual review each year by the Board, where the citizens of the community have the right to come in and talk about any problems that the operation is creating.
11. All proper documentation must be obtained that is required by the State of Ohio Department of Wildlife for any of the operations, raising of game birds and harvesting of game birds.

12. There will be no birds or deer that are killed, left to rot. Anything killed must be taken or disposed of properly.
13. The hours of operation will be 8:00 A.M. to 6:00 P.M.
14. Commercial hunting will be September 1 thru April 30.
15. Any field trials that are done will have 2 hunters, 2 judges, 2 dogs and possibly 2 gunners.
16. Activity will be solely on parcels F2610-012.000-037 and F2610-012.000-036.
17. There must be a 100-yard buffer zone between Mr. Loriz's property and the hunting area.

BE IT FINALLY RESOLVED, that a copy of this resolution be forwarded to the applicant and that said constitute an official notice.

July 26, 2001 /s/_____
Lee O. Steenken, Chair

Hamilton, Ohio /s/_____
William E. Balsinger, Secretary

APPENDIX 4

BOARD OF APPEALS OF BUTLER COUNTY, OHIO

CASE NO.: 2001 08 1777

[Filed August 6, 2001]

IN RE: APPLICATION OF)
CHARLES E. KELLER)
)

ZONING BOARD OF APPEALS
CASE NUMBER BXM01-26C

NOTICE OF APPEAL OF DECISION OF THE ZONING BOARD OF APPEALS OF BUTLER, COUNTY, OHIO

The undersigned, Michael Loriz and Cara Loriz, and by their counsel, Gregory E. Hatcher, hereby give notice of their appeal to the Common Pleas Court of Butler County, Ohio, from the final order, adjudication or decision of the Zoning Board of Appeals of Butler County, Ohio, made and rendered on the 26th day of July, 2001, in which it was decided by Resolution and held that Charles E. Keller was granted a variance granting a conditional use to conduct a commercial bird shooting preserve on his property located at 6508 State Road, Somerville, Ohio 45064, with certain stipulations. A

copy of the Resolution is attached hereto and marked Exhibit "A".

Respectively submitted,

/s/ _____
MICHAEL LORIZ

/s/ _____
CARA LORIZ

/s/ _____
GREGORY E. HATCHER
Attorney for Michael and Cara Loriz
Ohio Sup. Ct. Reg. No. 0021559
301 High St., Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

APPENDIX 5

In The Common Pleas Court
Butler County, Ohio

Case No. CV 2001 04 0714
Case No. CV01-08-1777 (Inactive)

[Filed December 11, 2001]

CARA LORIZ	)
Plaintiff	)
	)
v.	)
	)
CHARLES E. KELLER	)
Defendants	)
	)
AND	)
	)
MICHAEL LORIZ	)
Plaintiff	)
	)
v.	)
	)
BUTLER COUNTY BOARD	)
OF ZONING, et al.	)
Defendants	)
	)

ORDER FOR CASE CONSOLIDATION

It appearing to the Court that the above captioned matters involve similar issues of law and fact, it is hereby ordered that these cases be consolidated into the above listed active case number.

SO ORDERED,

/s/ _____
Judge Patricia S. Oney

/s/ _____
Judge Michael J. Sage

APPENDIX 6

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO.: CV2001-04-0714

[Filed February 20, 2002]

MICHAEL LORIZ	)
1566 OXFORD-MIDDLETOWN ROAD	)
HAMILTON, OHIO 45013	)
	)
AND	)
	)
CARA LORIZ	)
1566 OXFORD-MIDDLETOWN ROAD	)
HAMILTON, OHIO 45013	)
Plaintiffs,	)
	)
v.	)
	)
CHARLES E. KELLER	)
1242 BAUER ROAD	)
SOMERVILLE, OHIO 45064	)
	)
AND	)
	)
CHRISTOPHER E. KELLER	)
1242 BAUER ROAD	)
SOMERVILLE, OHIO 45064	)

AND)
)
MICHAEL SIMMONS)
3047 KIRCHLING ROAD)
HAMILTON, OHIO 45013)
)
AND)
)
RIDGEWIND QUAIL FARMS)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
NATIONAL SHOOT TO RETIREVE)
ASSOCIATION-OHIO REGION C/O)
REGION PRESIDENT: DION BLISS)
642 SANDUSKY STREET)
ASHLAND, OHIO 44805)
)
AND)
)
BUTLER COUNTY BOARD OF)
ZONING APPEALS)
LEE STEENKEN)
JOHN ZBORIL)
ALAN DANIEL)
THOMAS BEVINGTON)
GARY SALMON)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)

COURTNEY COMBS)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)
MICHAEL FOX)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)
CHARLES FURMON)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
Defendants.)
)

AMENDED COMPLAINT OTHER CIVIL WITH JURY DEMAND

Now comes the Plaintiffs, Michael and Cara Loriz, through counsel, and for their Complaint, and causes of action, state as follows:

I. PARTIES

1. Plaintiffs, Michael and Cara Loriz, (hereinafter referred to as "Loriz"), are husband and wife, and are the owners of residential property located at 1566 Oxford-Middletown Road, Milford Township, Butler County, Ohio.

2. Defendants, Charles E. Keller and Christopher E. Keller, are the owners of land located at 6508 State Road, Milford Township, Butler County, Ohio, and more specifically defined in the Butler County Auditor's Property records as comprised of Parcel Numbers F2610-012-000-028, F2610-012-000-036, and F2610-012-000-037 (hereinafter referred to as the "Keller Farm").

3. The Defendants, Charles E. Keller and Christopher E. Keller, ("hereinafter referred to as "Kellers"), are residents of Butler County, Ohio, residing at 1242 Bauer Road, Somerville, Butler County, Ohio.

4. The Defendant, Michael Simmons, (hereinafter referred to as "Simmons"), is a resident of Butler County, Ohio, residing at 3047 Circling Road, Hamilton, Butler County, Ohio.

5. The Defendant, Ridgewind Quail Farms is an unincorporated Field Trial Club, as that term is used in Title XV Conservation of Natural Resources, Ohio Revised Code 1533 et seq., owned and operated by Defendant, Charles E. Keller, and Defendant, Michael Simmons. Ridgewind Quail Farms principle place of business is 1242 Bauer Road, Somerville, Butler County, Ohio.

6. The Defendant, National Shoot to Retrieve Association-Ohio Region, is an unincorporated association, operated by Regional President, David Bliss, whose principle place of business is 642 Sandusky Street, Ashland, Ohio 44805.

7. The Defendant, Butler County Zoning Board of Appeals, and its members, Defendants Lee Steenken, John Zboril, Alan Daniel, Thomas Bevington and Gary Salmon,

are empowered by the Butler County Commissioner to enforce the Butler County, Ohio Zoning Resolution.

8. The Defendant's, Courtney Combs, Michael Fox, and Charles Furmon, are the County Commissioners elected to govern Butler County, Ohio, and in that capacity appoint various officials to perform regulatory functions interpreting and enforcing administrative rules, resolutions and regulations. In their capacity as County Commissioners, the Defendants appointed and/or are responsible for the acts or omissions of the Butler County Zoning Board of Appeals.

9. Venue properly lies in the Court of Common Pleas, Butler County, State of Ohio, pursuant to Civ.R. 3. Jurisdiction properly lies with the Court of Common Pleas, Butler County, State of Ohio.

II. OPERATIVE FACTS

10. The Loriz property is comprised of approximately 45 acres, a portion of which shares a common property line with the Keller Farm. The Keller Farm is comprised of approximately 180 acres. Both properties are zoned A-1 (Agricultural District) as defined in the Butler County Zoning Resolutions as revised March 11, 2000.

11. The Loriz property is mostly wooded, and is being reforested under the State of Ohio's State Stewardship Incentive Plan.

12. The Keller Farm is primarily cultivated fields.

13. The Loriz family residence is located less than 200 feet from the property line with the Keller Farm.

14. On or about November, 2000, the Defendants, Charles Keller, Christopher Keller, and Michael Simmons, began to advertise hunting, under the name Ridgewind Quail Farm. Advertising was accomplished by the posting of signs in the area surrounding Defendants' property located at 65087 State Road, with the name Ridgewind Quail Farm, combined with a phone number with the number suffix as "HUNT".

15. On or about May 10, 2000, Charles E. Keller applied and received approval for a Dog Training Grounds Application and Permit, with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.191. (Copy of permit application attached as Plaintiff's Exhibit "A" and hereinafter referred to as "Training Permit".)

16. The Training Permit failed to provide a proper legal description of the property where the training was to be conducted.

17. On or about May 10, 2000, Charles E. Keller applied for a Commercial Wild Animal Propagation Permit Application and License with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.71. (Copy of permit application attached as Plaintiffs' Exhibit "B" and hereinafter referred to as "Propagation Permit".)

18. The Propagation Permit specified the Bobwhite Quail were to be held at the Keller Farm.

19. At a date, as yet unknown, but within the preceding 10 months, Charles E. Keller, applied for a Field Trial Club permit with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.19

20. On or about January 20 or 21, 2001, the Loriz family were awakened by the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of January 20, 2001, and was repeated on January 21, 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles Keller, Christopher Keller and Michael Simmons, in their individual capacities, and through a field trail club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant, National Shoot to Retrieve Association-Ohio Region. At the conclusion of the trials, awards were presented to the top three participants in various categories. Many of the aforementioned activities occurred within 200 feet of the Loriz family residence.

21. On or about March 24 and 25, 2001, a second field trial was conducted upon the Keller Farm again, awakening the Loriz family to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of March 24, 2001, and was repeated on March 25, 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail Hunt, and dog field trials, organized and operated by Charles Keller, Christopher Keller, and Michael Simmons, in their individual capacities, and through a field trial club know as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant, National Shoot to Retrieve Association-Ohio Region. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

22. Other field trials and activities envisioned by the Field Trial permits, have occurred on the Keller Farm in the preceding six months.

23. The Kellers constructed, or caused to be constructed, two wooden towers, in excess of fifteen feet in height, upon the Keller Farm and are utilized for judging the field trials which were the subject of the aforementioned permits. Such towers are within several hundred feet from the Loriz family residence.

24. The January 20 and 21, 2001, activities that occurred on the Keller Farm, were field trials, as that term is defined in the O.R.C. 1533 et. seq. The Kellers, nor Ridgewind Quail Farms, nor National Shoot to Retrieve Association-Ohio Region, were in compliance with the signage requirements of O.R.C. 1533.22.

25. The January 20 and 21, 2001, activities that occurred on the Keller Farm, and the activities occurring on March 24 and 25, 2001, as well as the recently constructed two towers are all in violation of Articles 6 and 7 of the Butler County Zoning Resolutions as revised March 11, 2000.

26. On February 28, 2001, the Butler County Zoning Department issued a "Notice of Violation Under Butler County Zoning Resolution". (Copy attached as Plaintiff's Exhibit "C".) The aforementioned Notice of Violation specifically identified violations of Sections 6.01, 6.08, 7.01 and 7.03 of the Butler County Zoning Resolutions as revised March 11, 2000.

27. Participants of the January, 20 and 21, 2001, activities originating upon the Keller Farm, trespassed upon the Loriz property.

28. The activities that occurred on January 20 and 21, 2001, and March 24 and 25, 2001, upon the Keller Farm, as well as other items within the past six months caused the Loriz family to fear walking outside on their own property in an area that is in close proximity to the aforementioned activities for fear of being stricken by shotgun pellets emanating from the activities occurring upon the Keller Farm.

29. On July 26, 2001, the Defendants, Lee Steenken, John Zboril, Alan Daniel, Thomas Bevington, and Gary Salmon, in their capacity as members of the Butler County Zoning Board of Appeals granted a Conditional Use to the Defendants, Kellers, allowing for the property to be used as a commercial bird shooting preserve. This granting of a conditional use was arbitrary and capricious. As a result thereof, the Plaintiffs have been deprived of the quiet enjoyment of their land, have had their land subject to trespass, have been subjected to nuisance and have been precluded from utilizing their land and thus been subject to a taking of their land, all to their detriment.

30. Notwithstanding, the Defendants, Kellers and Simmons, have failed to abide by the conditions and requirements set forth in the Conditional Use all to the Plaintiffs detriment.

COUNT ONE

VIOLATION OF THE BUTLER ZONING RESOLUTIONS

31. Plaintiffs repeat Paragraphs 1 through 30 as if fully rewritten herein.

32. The Defendants, the Kellers and Ridgewind Quail Farm, are in violation of the Butler County Zoning Resolutions, and such violations result in the Loriz loss of Quiet Enjoyment, such violations constitute a wrongful taking of real property, as the Loriz may not use that portion of their property adjoining the Keller Farm, when field trial activities are taking place. [The Kellers use the Loriz wooded property to provide "cover" for Quail they raise and release for field trials unjustly enriches them at the Loriz expense.]

33. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT TWO

LOSS OF QUIET ENJOYMENT

34. Plaintiffs repeat Paragraphs 1 through 33 as if fully rewritten herein.

35. The field trial activities identified above, are permitted by the Defendants, the Kellers, Simmons, and Ridgewind Quail Farm, and result in the Loriz loss of Quiet Enjoyment. The activities preclude the Loriz from enjoying their property in a manner reasonably to be expected for property zoned A-1 Agricultural as set forth above.

36. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT THREE

TRESPASS TO LAND

37. Plaintiffs repeat Paragraphs 1 through 36 as if fully rewritten herein.

38. The Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, resulted in the Loriz property being trespassed upon.

39. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FOUR

NUISANCE

40. Plaintiffs repeat Paragraphs 1 through 39 as if fully rewritten herein.

41. The actions of the Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, constitute a nuisance, due to excessive noise, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose' the Keller

Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the field trials are firing their weapons in close proximity to the Loriz family home, thereby creating a potential and unreasonable risk of harm.

42. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FIVE

PRIVATE TAKING OF REAL PROPERTY

43. Plaintiffs repeat Paragraphs 1 through 42 as if fully rewritten herein.

44. The Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, actions constitute a private taking of real property, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the field trials are firing their weapons in close proximity to the Loriz family home and adjacent property, creating a potential and unreasonable risk that someone on the Loriz property may be struck by shot from participants in the field trial. Such risk, thereby precludes a reasonable and prudent person from utilizing their personal property for their own use and enjoyment during the aforementioned field trials.

45. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

WHEREFORE, the Plaintiffs pray that this Court grant judgment in an amount in excess of Twenty-five Thousand Dollars ($25,000.00), representing the damages suffered by Plaintiffs as a result of Defendants violation of the Zoning Resolutions, loss of quiet enjoyment, trespass to land, nuisance, private taking of real property, and violations of Plaintiffs' Due Process Rights, plus court costs, punitive damages, attorney fees, and all other relief this Court deems fit.

Respectfully submitted,

/s/_____
GREGORY E. HATCHER
Co-Counsel for Plaintiffs
Ohio Sup. Ct. Reg. No. 0021559
301 High Street, Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

/s/_____
DONALD C. LEROY
Co-Counsel for Plaintiffs
Ohio Sup. Ct. Reg. No.
304 N. Second Street
Hamilton, Ohio 45011
Telephone: (513) 867-8200

JURY DEMAND

The Plaintiffs herein requests this Court empanel a jury to hear the within cause of action.

/s/_____
GREGORY E. HATCHER
Attorney for Plaintiffs
Ohio Sup. Ct. Reg. No. 0021559
301 High Street, Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

APPENDIX 7

COURT OF COMMON PLEAS
Butler County, Ohio

Case No. CV 2001-04-0714

[Filed April 11, 2003]

Michael Loriz, et al	)
Plaintiffs	)
	)
v.	)
	)
Charles E. Keller, et al	)
Defendants	)
	)

ENTRY

This matter came on for hearing on the appeal of the Plaintiffs/Appellants, Michael Loriz and Cara Loriz from the final decision of the Zoning Board of Appeals of Butler County, Ohio, issued on July 26, 2001, and the amended decision issued February 19, 2003, granting a variance to Defendants/Appellees Charles E. Keller regarding his property located at 6508 State Road, Somerville, Ohio, 45064, permitting a commercial bird shooting preserve.

Section 2506.04 of the Ohio Revised Code sets forth the standard of review that the Court must apply. The Court may

find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The Court may affirm, reverse, vacate or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions, or decision with the finding or opinion of the Court.

The Court must weigh the evidence in the record, and whatever additional evidence was permitted pursuant to statute to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. This does not mean, however that the Court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. (Dudukovich v. Housing Authority, 58 OS 2nd 202

This Court, after careful consideration of the evidence finds that the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record.

It is therefore the order of this Court that the decision of the Butler County Board of Zoning Appeals is affirmed.

This Court further finds that this is no just cause for delay and this is a final appealable order.

This Court further finds that the previous stay order issued by this Court is hereby vacated.

Costs to Plaintiffs.

/s/_____
Judge William B. Stapleton

APPENDIX 8

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NO. CA2003-04-100

[Filed December 8, 2003]

IN RE:	)
	)
APPLICATION OF	)
CHARLES E. KELLER.	)
	)

CIVIL APPEAL FROM BUTLER COUNTY
COURT OF COMMON PLEAS
Case No. CV01-04-0714

OPINION

VALEN, P.J.

{¶1} Appellants, Michael and Cara Loriz, appeal the decision of the Butler County Court of Common Pleas affirming the decision of appellee, Butler County Board of Zoning Appeals ("BZA"), granting appellee, Charles Keller ("Keller"), a conditional use permit to operate a commercial hunting range. We affirm the decision of the lower court.

{¶2} In July 1995, appellants purchased 45 acres of property in Butler County adjacent to Keller's property. Appellants built a 5,000 square foot home on the property.

{¶3} In September 1995, Keller approached appellants and informed them of his intention to open a commercial hunting range on his property with his business partner, Michael Simmons ("Simmons"). However, Keller's financial backers reconsidered and the commercial hunting range was not opened.

{¶4} In 2001 Keller erected a sign advertising his business, Ridgewind Quail Farm. Keller raises pheasants, quail, partridge and ducks and allows hunters to hunt the farm-raised birds. On February 28, 2001, Keller was cited for running a commercial hunting business on his property. The BZA affirmed the violation order. Keller then applied to the BZA for a conditional use permit to operate a commercial hunting range on his property. A hearing was held on July 17, 2001. The BZA granted the conditional use permit with several conditions.

{¶5} Appellants appealed the granting of the conditional use permit to the Butler County Common Pleas Court. The common pleas court remanded the matter to the BZA with orders to hear additional testimony and to submit written findings of fact to the common pleas court. The BZA heard additional evidence on February 4, 2003. Following the hearing, the BZA filed "Conclusions of Fact" with the common pleas court.

{¶6} On April 11, 2003, the common pleas court affirmed the BZA's decision to grant Keller a conditional permit for a commercial hunting range. Appellants appeal the common pleas court's decision raising two assignments of error:

{¶7} Assignment of Error No. 1:

{¶8} "THE JULY 17, 2003 [SIC] BZA HEARING WAS NOT CONDUCTED IN ACCORDANCE WITH OHIO LAW."

{¶9} Appellants argue that the July 17, 2001 hearing was not conducted as an adjudicatory hearing. Appellants maintain that "the hearing was conducted as a non-evidentiary, public political meeting, at which any member of the public could speak, regardless of whether he or she possessed information relevant to the BZA's decision." Therefore, appellants maintain that it was improper to "rely on subjective and unsubstantiated opinions, unsworn testimony, and testimony not subject to cross-examination."

{¶10} The transcript indicates that all witnesses except for two were sworn at the July 17, 2001 hearing. The two witnesses not sworn were attorneys. The Board stated that as officers of the court, "it's not necessary to swear you in." However, appellants never requested that witnesses be sworn in. The "omission of administration of the oath to a witness in a trial or administrative hearing is a waivable error." *Dudukovich v. Lorain Metro. Housing Auth.* (1979), 58 Ohio St.2d 202, 206. Where there is no objection to the admission of unsworn testimony at an administrative hearing, any error allowing such evidence is waived and the court must then consider the unsworn testimony as though it were given under oath. *Zurow v. Cleveland* (1978), 61 Ohio App. 2d 14, syllabus. Furthermore, if timely objection is not made "this error is waived throughout the entire proceeding, including the appellate level." Id. Since appellants did not object to the witnesses that were not sworn in, appellants have waived this issue.

{¶11} Appellants also argue that they were not permitted to cross-examine witnesses. However, they never asked to cross-examine witnesses during the proceedings before the BZA. Failure to request cross-examination of a witness acts as a waiver. *Kandell v. City Council of Kent* (Aug. 2, 1991), Portage App. No. 901-P-2255. Inasmuch as appellants did not "raise the issue of cross-examination during the proceedings before the [BZA], they waived their rights to claim these errors in an appeal to the Common Pleas Court *** and subsequently to this court." *Zurow* at 24.

{¶12} Appellants also argue that they were "limited in presenting evidence in ways Keller was not." As an example, appellants argue that their "testimony was limited to five minutes." However, a review of the record demonstrates that Michael Loriz stated at the hearing, "I'd like to, within five minutes if I can, try to give you a little background of the entire-six-year history of my involvement with the case and then go into the safety aspects which I think are very critical from my - from my standpoint." When Loriz concluded he was asked, "do you have any concluding remarks?" Loriz responded, "thank you very much for your time and consideration. And I would ask that you deny this request that's before you." Furthermore, after Simmons testified before the BZA, Loriz was allowed to offer a rebuttal of statements made by Simmons. We find that the appellants were not limited in presenting evidence.

{¶13} The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record." A court of appeals is required to affirm the decision of a common pleas court in an appeal of an administrative decision "unless the court of appeals finds, as a matter of law, that the

decision of the Common Pleas Court is not supported by a preponderance of reliable probative and substantial evidence." *Dudukovich*, 58 Ohio St.2d at 207.

{¶14} Having examined the record, this court finds that appellants have waived any errors regarding unsworn testimony and testimony not subjected to cross-examination.

Furthermore, appellants were not limited in presenting evidence. The decision of the common pleas court is supported by a preponderance of reliable probative and substantial evidence, and the common pleas court did not abuse its discretion in finding as it did. The first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE COURT OF COMMON PLEAS ERRED IN UPHOLDING THE CONDITIONAL USE PERMIT TO OPERATE A COMMERCIAL HUNTING RANGE BECAUSE THE BZA'S DECISION WAS UNREASONABLE AND UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE."

{¶17} Appellants argue that "even if the Common Pleas Court were permitted to consider the unsworn and uncross-examined [sic] evidence submitted at the July 17, 2001 hearing, the court still erred in upholding the BZA's decision because Keller's evidence was overwhelmed by the evidence submitted by the Lorizes."

{¶18} A common pleas court should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that there is

not a preponderance of reliable, probative and substantial evidence to support the board's decision. *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Furthermore, the common pleas court "must give due deference to the administrative agency's resolution of evidentiary conflicts." *Budd Co. v. Mercer* (1984), 14 Ohio App.3d 269, 273-4. The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record."

{¶19} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, rehearing denied (1993), 67 Ohio St.3d 1439. In *Pons*, the Ohio Supreme Court noted:

{¶20} "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court. Instead, the appellate court must affirm the trial court's judgment." Id. See, also, *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.* (Sept. 24, 1992), Franklin App. No. 91AP-1493, motion to certify overruled, 66 Ohio St.3d 1459. After reviewing the common pleas court's decision, we find that the lower court did not abuse its discretion as there was evidence in the BZA findings supporting its decision.

{¶21} Appellants also argue that the transcripts of the hearing are inaccurate as words are "randomly misstated and omitted." Therefore, appellants argue that the decision should be vacated and remanded for a new hearing so that an accurate record of testimony can be made.

{¶22} Pursuant to R.C. 2506.03, which deals with the hearing of an appeal from an administrative decision, "[t]he hearing of such an appeal shall proceed as in trial of a civil action, but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that "[t]he transcript does not contain a report of all evidence admitted or proffered by the appellant."

{¶23} We have reviewed the transcripts and found that the gaps are not so extensive that the gist of the arguments and testimony cannot be ascertained. *Franklin Twp. v. Marble Cliff* (1982), 4 Ohio App.3d 213, 216. See, also, *BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App. 3d 423, 436. Consequently, the second assignment of error is overruled.

{¶24} Judgment affirmed.

YOUNG and POWELL, JJ., concur.

APPENDIX 9

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO. CV2001 04 0714

[Filed December 6, 2005]

MICHAEL LORIZ, et al.	)
Plaintiff,	)
	)
v.	)
	)
CHARLES E. KELLER,	)
et al.	)
Defendants.	)
	)

(Judge McCracken)

DECISION

This matter came before the court for oral hearings on various motions. The responses thereto filed by both the plaintiffs and the defendants.

The first motion before the court is defendant's "Motion to Award Damages to Defendant against Plaintiff." On April 11, 2003, this court upheld the decision of the Butler County Board of Zoning Appeals which granted the defendants the

right to operate a commercial hunting preserve known as Quail Ridge Hunt Club. This mater was before the court pursuant to an appeal of the BZA decision which was filed by plaintiffs, Michael and Cara Loriz, pursuant to R.C. Sec. 2506.01 et seq "Administrative Appeals." As part of this appeal, the plaintiffs requested a stay of the BZA decision. Now the defendants, having been successful, want damages. Their request for damages is couched in terms of Civ. R. 65(B) which refers to preliminary injunctions and the granting of damages. However, in this particular case this was not an injunction but a stay granted pursuant to Sec. 2635 of the Butler County Zoning Resolution. Although defendants requested an appeal bond, that request was not approved by the court and no bond was ever required to be posted.

The court finds that there is no provision for granting damages in regard to a "stay" where the applicant is unsuccessful. Even if there was, the amount of damages is limited to the amount of the bond. In this case, no bond was required. *Consulting Agency v. Kingsland*, 69 O App. 3d 753 (1990).

Defendants' Motion for Damages is therefore **denied**.

The second motion before the court was filed by the plaintiffs to Order Withdrawal of John B. Connaughton as counsel to defendants Keller and Simmons. Plaintiffs argue that they intend to call Connaughton as a witness to testify about his knowledge of the case and to testify about his presence at the hunting club during which time a video was made of some test shots and a decibel meter (to show noise levels). Mr. Connaughton was not the only person present.

The court has reviewed the Disciplinary Rules DR5-102(B) and finds that plaintiffs' motion is premature. DR5-

102(B) only requires an attorney to step down if it is apparent that his testimony is or may be prejudicial to his client. At this time, it is not clear whether this is the case. Plaintiffs also take exception to Connaughton's representation before the BZA. However, his comments before the BZA were in the form of argument and summation and cannot be considered as testimony on behalf of his client, no matter how forceful they might have been.

For these reasons, plaintiffs' motion to order the withdrawal of J.B. Connaughton as attorney for defendants is **denied** at this time.

The third motion before the court was filed on behalf of the Butler County Commissioners and the members of the Butler County Board of Zoning Appeals (BZA) to dismiss the amended complaint which added them as party defendants. In paragraphs 7 and 8 of the plaintiff's amended complaint, the commissioners are identified only as having the authority to appoint the members of the BZA and plaintiff claims that because of this they are responsible for their actions. The BZA is identified as having the power to enforce the zoning resolution. In paragraph 29, the BZA is accused of acting in an arbitrary and capricious manner in the granting of the conditional use permit to the defendants herein. No other allegations are made against the commissioners and the BZA in counts 1 through 5 of the amended complaint.

R.C.Section 303.04 requires the Board of County Commissioners to appoint a zoning commission and R.C. 303.13 also requires the Board to appoint a Board of Zoning Appeals.

R.C. 2744.02(A) classifies the functions of a political subdivision as either governmental or proprietor and except

for specified exceptions a political subdivision is not liable in a civil action for damages. In this particular case, neither the action of the commissioners nor the BZA fall into one of the exceptions to liability. R.C. 2744.02(C) defines governmental function as any function that is performed by a political subdivision voluntarily or pursuant to legislative requirement. The Court finds that the Butler County Commissioners in appointing the members of the BZA were performing their governmental function in that they were required by law to appoint the members of the BZA.

With regard to the BZA, the Court also finds that they were fulfilling a governmental function in that they were performing a quasi-judicial function. See R.C. 2744.01(C)(2)(f). The Court finds after a review of the record that the BZA hearing resembled a judicial proceeding in that notice of the BZA proceedings were sent to both the plaintiff and defendant, who were both represented by counsel. At the hearing, the BZA also afforded both sides the opportunity to present their positions with evidence regarding whether to grant or deny the conditional use permit, and finally, a record was made. This decision was eventually appealed pursuant to R.C. 2506.01. (See Ikovich v. Steubonville, 144 Ohio App 325; Talbut v. Perrysburg, 72 O. Ap 3d 475.

The Court finds after a review of the pleadings and the record, that both the Butler County Commissioners and the BZA were fulfilling their governmental functions and are not liable in a civil action for damages.

The motion of the defendants Butler County Commissioners and the Butler County BZA is granted and they are hereby dismissed as party defendants in the above-captioned case.

The fourth motion to be considered by the Court is the Motion for Relief form Judgment filed pursuant to Civ. R. 60(B) by the plaintiffs. The plaintiffs allege that several exhibits submitted into the Court record as part of the original administrative appeal from the BZA are missing and have either been misplaced, lost, or were never provided to the Court in the first place. For these reasons, the plaintiffs assert that they should be granted relief from judgment on the grounds of mistake, inadvertence, excusable neglect or any other reason justifying relief.

The judgment from which plaintiffs seek relief was rendered by Judge William Stapleton on April 11, 2003. (Judge Stapleton is now deceased). The plaintiffs' contention is that because the record is not clear whether Judge Stapleton was provided these exhibits or had access to them, that his judgment is faulty and should be re-heard. During this time period, the plaintiff-appellants were represented by counsel who filed extensive trial memorandum, both before Judge Stapleton and also before the Court of Appeals in which he recited the facts and made reference to these documents. If in fact these documents were missing, and there is no way to determine this, Judge Stapleton was made aware of them, and if necessary could have requested that counsel supply them.

The Court finds that the plaintiffs have failed to establish any of the five prongs of Civ. R. 60(B) and for this reason, the Motion to Reconsider is hereby **denied**.

Enter this 4 day of December, 2005.

So Ordered,

/s/_____
William B. McCracken, Judge

APPENDIX 10

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Case No. CV05-07-2228

[Filed July 6, 2005]

MICHAEL LORIZ, et al.	)
Appellant	)
	)
v.	)
	)
Butler County Board of	)
Zoning Appeals	)
	)

NOTICE OF APPEAL OF DECISION OF THE ZONING BOARD OF APPEALS OF BUTLER COUNTY, OHIO

The undersigned, Michael Loriz and Cara Loriz, representing themselves as pro se appellants, hereby give notice of their appeal to the Common Pleas Court of Butler County, Ohio, from the final order, adjudication or decision of the Zoning Board of Appeals of Butler County, Ohio, rendered on the 9th day of June, 2005, in which it was decided by Resolution and held that Charles E. Keller may operate his commercial recreational facility at his property located at 6508 State Road, Somerville, Ohio, 45064, 365

days a year, from sunrise to sunset, and without any further annual review by the Board. A copy of the Resolution is attached hereto and marked Exhibit "A."

Appellants also ask that a Stay of Proceedings be enforced by the Board of Zoning Appeals, staying the expanded operation of the subject commercial recreational facility. If the Board refuses to do so, appellants ask that such a Stay be ordered by the Court in accordance with Section 26.35 of the Butler County, Ohio Zoning Resolution which states:

> An appeal shall stay all proceedings in furtherance of the action appealed from, unless the Zoning Inspector certifies to the Board, after notice of appeals shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by an order which may, on due cause be granted by the board on application after notice to the Zoning Inspector, or by judicial order.

Respectfully submitted,

/s/_____
MICHAEL H. LORIZ
Pro Se Counsel/Plaintiff
PO Box 923; 11 Marc Street
Shelter Island, NY 11964-0923

/s/_____
CARA F. LORIZ
Pro Se Counsel/Plaintiff
PO Box 923; 11 Marc Street
Shelter Island, NY 11964-0923

APPENDIX 11

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 06-3427

[Filed July 13, 2006]

MICHAEL HANNING LORIZ;	)
CARA FRANCKE LORIZ	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
JOHN B. CONNAUGHTON, et al	)
Defendants-Appellees.	)
	)

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

The Plaintiffs-Appellants move this Court for an injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. In accordance with that Rule, Plaintiffs-Appellants filed an initial motion in the District Court on April 6, 2006. The District Court has not acted. With no assurance from the District Court clerk that the motion will be adjudicated before the end of the appeal period, action by the District Court appears to be impracticable.

Plaintiffs-Appellants ask this Honorable Court to enjoin the irreparable harm created by an unconstitutional taking acknowledged by the District Court in its appealed decision. Beginning September 1, 2006 (absent injunction), another season of shooting operations will be commenced by the Defendants-Appellees, and lead shot trespass onto our property (and onto the local watershed) will continue. Opposition counsel was previously noticed of the instant motion by way of the District Court filing of April 6, 2006, as well as in our Second Reply in Support of Motion to Reconsider, mailed June 29, 2006. That motion challenges an extension of time granted to the Defendant-Appellees by the clerk, a delay in briefing that heightens the need for the injunction.

Respectfully submitted,
/s/_____
/s/_____
MICHAEL H. LORIZ
CARA F. LORIZ
Pro Se Plaintiffs-Appellants
11 Marc Street
P.O. Box 923
Shelter Island, NY 11964

MEMORANDUM IN SUPPORT

Plaintiffs-Appellants (hereinafter, the Loriz family) ask the Court to enjoin shooting operations by Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts LLC (hereinafter, the Shooters) that result in lead shot trespass as illegally and unconstitutionally authorized by Defendant Stephen Gray (the State) and the County (Defendants Steenken, Bevington, Salman, Zboril, Filpot, Daniel[1], Turner, Gates, Balsinger, J. Fox, M. Fox, Jolivette, Furmon, Dwyer, Jones and Piper).

The District Court ruling under appeal found that shooting operations authorized by the State and County substantiate a taking of the Loriz family property (R.75). We urgently request this Court to enjoin the permitting, licensing, and operation of shooting range, dog training and field trial activities on the property of Charles and Christopher Keller during the pendency of the appeal of our case in the Sixth Circuit. We specifically ask for an injunction against the County conditional use permit (BZA Resolution No. 01-26C) and all State Division of Wildlife permits and licenses for shooting activities of any kind on the Keller property.

---

[1] These first six defendants are Butler County Board of Zoning Appeals members and when referred to as a group separately from the other County Defendants are named "the BZA."

APPENDIX 12

RELEVANT STATUTORY PROVISIONS INVOLVED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

TITLE 25. COURTS -- APPELLATE
CHAPTER 2506. APPEALS FROM ORDERS OF ADMINISTRATIVE OFFICERS AND AGENCIES

O.R.C. § 2506.04

§ 2506.04. Finding and order of court

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

TITLE 1. STATE GOVERNMENT
CHAPTER 163. APPROPRIATION OF PROPERTY

O.R.C. § 163.05

§ 163.05. Petition for appropriation

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership,

or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and addresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation;

(H) In the event of an appropriation where the agency would require less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation shall be for the whole parcel and all structures.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of

property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

O.R.C. § 163.09

§ 163.09. Valuation of property taken; how determined

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, and no approval ordered by the court to a settlement of the rights of all necessary parties, the court, on motion of a public agency, shall declare the value of the property taken and the damages, if any, to the residue to be as set forth in any document properly filed with the clerk of the court of common pleas by the public agency. In all other cases, the court shall fix a time, within twenty days from the last date that the answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or

board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity. If, as to any or all of the property or other interests sought to be appropriated, the court determines the matters in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of that determination. An order of the court in favor of the agency on any of the matters or on qualification under section 163.06 of the Revised Code shall not be a final order for purposes of appeal. An order of the court against the agency on any of the matters or on the question of qualification under section 163.06 of the Revised Code shall be a final order for purposes of appeal. If a public agency has taken possession prior to such an order and such an order, after any appeal, is against the agency on any of the matters, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (A)(2) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court, with the consent of the parties, may order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

(F) If an answer is filed under section 163.08 of the Revised Code with respect to the value of property appropriated under section 307.08, 504.19, 6101.181 [6101.18.1], 6115.221 [6115.22.1], 6117.39, or 6119.11 of the Revised Code as the result of a public exigency, the burden of proof with respect to that value is on the party or parties to the appropriation other than the property owners.

O.R.C. § 163.17

§ 163.17. Interest payable on verdict

Where the agency has the right to take possession of the property before the verdict upon payment into court of a deposit, and a portion of said deposit may be withdrawn immediately by the owner, the amount of the verdict which exceeds the portion of the deposit withdrawable shall be subject to interest from the date of taking to the date of actual payment of the award.

Where the agency has no right to take possession of the property before the verdict, if the award is not paid to the owner or deposited in court within twenty-one days after journalization of the verdict, interest thereafter shall accrue, except that where the owner appeals, interest shall not accrue until the agency takes possession.

If the owner appeals and is granted a larger award, interest shall be paid on the additional amount awarded from the date

of taking possession to the date of actual payment or date of deposit with immediate right of withdrawal.

If the agency wishes to appeal, it may require the deposit to remain with the court pending final disposition of the case provided it pays interest on the final award from date of taking possession to the date the money is actually paid or made available to the owner; provided, the owner may withdraw the entire award upon posting an appropriate refund bond set by the court; and provided, that where a building or other structure is taken, the court may, on application of the owner, permit the owner to withdraw a reasonable portion of the award allocable to the building without giving bond.

If the amount of any deposit actually withdrawn by the owner exceeds the final award from which no appeal is or can be taken, then the owner at the time of entry of judgment on such award shall refund at once to the court for the account of the agency the amount of such excess plus interest on such excess from the date of withdrawal of such excess until the date of such refund, and upon the failure of the owner to make such refund, the agency shall be entitled to a money judgment against the owner.

Except for cases involving the department of transportation, interest as provided for in this section shall be at the rate of interest for judgments as set forth in section 1343.03 of the Revised Code. In a case involving the appropriation of property by the department of transportation, and the department is the sole public agency seeking to appropriate property in the case, interest as provided for in this section shall be at the per annum rate of either the interest rate as defined and established in division (E) of section 5703.47 of the Revised Code, or ten per cent, whichever is less.

TITLE 1. STATE GOVERNMENT
CHAPTER 163. APPROPRIATION OF PROPERTY DISPLACED PERSONS

O.R.C. § 163.54

§ 163.54. Additional payments for dwelling owned and occupied a minimum of 180 days

(A) In addition to payments otherwise authorized by sections 163.51 to 163.62 of the Revised Code, the head of the displacing agency shall make an additional payment not to exceed twenty-two thousand five hundred dollars to any displaced person who is displaced from a dwelling actually owned and occupied by him for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements:

(1) The amount, if any, which when added to the acquisition cost of the dwelling acquired by the displacing agency, equals the reasonable cost of a comparable replacement dwelling.

(2) The amount, if any, which will compensate the displaced person for any increased interest costs and other debt service costs which the person is required to pay for financing the acquisition of a comparable replacement dwelling. This amount shall be paid only if the dwelling acquired by the displacing agency was encumbered by a bona fide mortgage which was a valid lien on the dwelling for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the dwelling.

(3) Reasonable expenses incurred by the displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(B) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one-year period beginning on the date on which he receives from the displacing agency final payment of all costs of the acquired dwelling, or on the date on which the displacing agency's obligation under division (B)(3) of section 163.56 of the Revised Code is met, whichever is later, except that the displacing agency may extend the period for good cause. If the period is extended, the payment under this section shall be based on the costs of relocating the person to a comparable replacement dwelling within one year after the displaced person receives from the displacing agency final payment of all costs of the acquired dwelling.

O.R.C. § 163.55

§ 163.55. Additional payments for dwelling occupied a minimum of 90 days

(A) In addition to amounts otherwise authorized by sections 163.51 to 163.62 of the Revised Code, the head of a displacing agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 163.54 of the Revised Code which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling, or in any case in which displacement is not a direct result of

acquisition, not less than ninety days prior to such other event as the head of the lead agency shall prescribe. The payment shall consist of the amount necessary to enable the displaced person to lease or rent for a period not to exceed forty-two months, a comparable replacement dwelling, but not to exceed five thousand two hundred fifty dollars. At the discretion of the head of the displacing agency, a payment under this division may be made in periodic installments. Computation of a payment under this division to a low-income displaced person shall take into account the person's income.

(B) Any person eligible for a payment under division (A) of this section may elect to apply the payment to a down payment on, and other incidental expenses pursuant to, the purchase of a decent, safe, and sanitary replacement dwelling. The person may, under criteria established by the head of the displacing agency, be eligible under this division for the maximum payment allowed under division (A) of this section, except that, in the case of a displaced homeowner who has owned and occupied the displacement dwelling for at least ninety days but not more than one hundred eighty days immediately prior to the initiation of negotiations for the acquisition of such dwelling, the payment shall not exceed the payment the person would otherwise have received under section 163.54 of the Revised Code had the person owned and occupied the displacement dwelling one hundred eighty days immediately prior to the initiation of the negotiations.

O.R.C. § 163.61

§ 163.61. Reimbursement to owner for incidental expenses

The head of a state agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a

condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency considers fair and reasonable, for expenses he necessarily incurred for:

(A) Transfer taxes, and similar expenses incidental to conveying such real property to the state agency;

(B) Penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property;

(C) The pro rata portion of any real property taxes paid which are allocable to a period subsequent to the date of vesting title in the state or state agency, or the effective date of possession of such real property by the agency, whichever is the earlier.